No. 15,805

United States Court of Appeals

For the Ninth Circuit

MAGNOLIA MOTOR & LOGGING CO., a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT, MAGNOLIA MOTOR & LOGGING CO., A CORPORATION.

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vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT, MAGNOLIA MOTOR & LOGGING CO., A CORPORATION.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of conviction of violation of 18 U.S.C.A. Sec. 641 and of 18 U.S.C.A. Sec. 1361, entered by the United States District Court, for the Northern District of California, Northern Division. The appellant gave timely notice of appeal. (TR 26.)

The United States Court of Appeals for the Ninth Circuit, has jurisdiction to review the judgment under the provisions of 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE.

Appellant is a corporation. It, and its President and Managing Officer, R. Drew Lamb, were indicted

under 18 U.S.C.A. Sec. 641 for knowingly, wilfully and unlawfully stealing and converting a quantity of logs of the United States, and under 18 U.S.C.A. Sec. 1361 for knowingly, wilfully and unlawfully depredating certain real property of the United States. (TR 3, 4.)

The appellee's evidence to support these charges was intended to show that at sometime between June 1, 1953 and December 30, 1954, the appellant had logged a quantity of standing timber from an area which was later, on March 30, 1956, officially designated as Township 11½, North, Range 3 East, Humboldt Meridian. (Plaintiff's Exhibits 3 and 6.) All evidence offered against the appellant showed it acted only through its co-defendant, R. Drew Lamb, who was jointly tried with appellant and who was adjudged not guilty.

Township 11½ North is a strip of land lying between Township 12 North and Township 11 North, Range 3 East, Humboldt Meridian.

In 1882, a Government surveyor named Hahn surveyed said Township 11 North. In the same year a Government surveyor named Foreman surveyed said Township 12 North, using the Hahn north boundary of Township 11 as the south boundary of Township 12. In 1883, the plat of the Foreman survey of Township 12 was approved by the United States Surveyor General. In 1884, because of fraudulent survey work, both the Hahn and Foreman surveys were suspended.

In 1886, a resurvey was made of said Township 11 North by a Government surveyor named Gilcrest. In

1889 the Gilcrest survey of Township 11 was officially approved by the Surveyor General. In 1896 the said Foreman survey of Township 12, which previously had been suspended by the Surveyor General, was reinstated. This resulted in the two townships having a common boundary line according to plat.

Between 1901 and 1908, the United States issued patents in certain sections of Townships 11 and 12 North, Range 3 East—H.M. In at least one instance a single patent was issued containing contiguous parcels of land in both townships. (Defendant's Exhibits S 1 and A 1 (marked L 1) Tr. p. 1044, Tr. p. 1032, line 12 to p. 1044, line 22.)

In 1926 a Government surveyor named Joy retraced portions of the Gilcrest North boundary of said Township 11 and apparently found discrepancies which he reported.

In 1950 R. Drew Lamb commenced negotiations for the purchase of a large tract of land in Humboldt County, California, a portion of which is the specific area set forth in the bill of particulars filed by the Government. (TR 17.) On July 15, 1950, a contract of sale was entered into whereby Magnolia Lumber Sales Co., an Oregon partnership, of which Lamb was the managing partner, purchased approximately 10,000 acres of timber land in this area from Arrow Mills Co. Following this, the appellant Magnolia Motor & Logging Co., a corporation, qualified to do business in California and was engaged by the said Magnolia Lumber Sales Co. as an independent contractor to log its timber.

After Magnolia Lumber Sales Co. purchased the property from Arrow Mills Co., and before any logging was done, R. Drew Lamb, President of appellant and Managing Partner of Magnolia Lumber Sales Co., procured the advice of competent legal counsel and thoroughly investigated the findings and opinions of his predecessors in interest of the alleged unsurveyed area, and on the basis of such investigation satisfied himself, as President of appellant, that there was a common line between Township 11 North and 12 North and that no hiatus existed. This was his belief between the 1st day of June, 1953, and the 30th day of December, 1954. (Tr. 1301-1302.)

During 1952, 1953 and 1954, logging operations in the general area were conducted by Magnolia Motor & Logging Co. In 1954, a Government surveyor, Roger F. Wilson, was directed to investigate the condition of the survey to see *if there was a hiatus* between the two townships, and if he found one, to survey it. (Tr. 125, 133.) On March 30, 1956, the Wilson survey plat was filed and approved by the Surveyor General; this plat created Township 11½ and for the first time effected a record hiatus between Townships 11 and 12 which, until that time, had of record enjoyed a common boundary line with no intervening area between them.

The trial court declined on motion to direct a verdict in favor of appellant. (TR 19-22.)

QUESTIONS PRESENTED.

1. Is not the verdict of guilty as to the appellant corporation so inconsistent with the verdict of acquittal of the co-defendant, R. Drew Lamb, that the verdict of appellant must be set aside?

2. Is not the logging and removal of standing timber on unsurveyed land a violation only of the specific provisions of either 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853, rather than a violation of the general provisions of 18 U.S.C.A. 1361?

3. Is not the cutting and removal of standing timber clearly without the provisions of 18 U.S.C.A. 641, but rather a violation of either 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853?

4. Is not a conviction under sections 18 U.S.C.A. 641, and 18 U.S.C.A. 1361, for the specific course of action charged, a violation of due process as protected by the Fifth Amendment to the Constitution of the United States?

5. Does not the acquittal of R. Drew Lamb, the sole acting agent of appellant corporation, affirmatively establish that no crime had been committed by the appellant corporation due to the absence of either specific intent or *mens rea?*

6. Under all the evidence adduced, were not the acts of appellant, based on investigation and on advice of counsel, conduct which was less than wilful and therefore not criminal?

7. Was not the court's instruction to the jury that the land known as Township 11½ North, Range 3

East, Humboldt Base & Meridian, is and *was the property of the United States during the periods of time charged in the indictment* prejudicial error in that it invaded the province of the jury and gave an *ex post facto* application to the survey?

8. Did not the surveys approved and filed in 1889 and 1896 legally identify the contiguous boundary lines of Townships 11 and 12, which boundaries were legally established until Township 11½ was *created* by the filing of the Wilson survey on March 30, 1956, so as to negate any criminal intent on the part of appellant?

SPECIFICATIONS OF ERROR.

1. The District Court erred in denying appellant's motion to dismiss the indictment.

2. The District Court erred in denying appellant's motion for acquittal.

3. The District Court erred in failing to direct a verdict of not guilty.

4. The District Court erred in receiving a verdict of guilty as to appellant.

5. The District Court erred in faling to enter a judgment that appellant was not guilty, notwithstanding the verdict.

6. The District Court exceeded its jurisdiction.

7. The verdict is not supported by substantial evidence.

8. The District Court erred in admitting into evidence plaintiff's Exhibit "3" and plaintiff's Exhibit "6".

Objection was made by appellant on the grounds that the Exhibits were "incompetent, irrelevant and immaterial," (Tr. 6, 10 and Extracts from Reporter's Transcript 6-54.) Exhibit 3 is the official plat of survey of Township 11½ North, Range 3 East, Humboldt Meridian (Admitted Tr. 8.) Exhibit 6 is the tract book record, pages 239-240 of sections 31, 32, 33, 34, 35 and 36, Township 11½ North. (Admitted Tr. 10.)

9. The District Court erred in refusing to admit into evidence defendants' Exhibit H for identification.

Objection was made by the plaintiff on the grounds that the Exhibit was irrelevant. (Tr. 1412.) Exhibit H is a letter addressed to the United States Department of Interior, Federal Land Department by Glen E. Adkisson, containing on the bottom thereof, a reply prepared and initialed by L.D.R. (Laurel D. Reimund) Land Law Clerk, Sacramento office of Bureau of Land Management. (Tr. 83-87, 1171-1176, 1407-1412.) (Denied Admission Tr. 1412.)

10. The District Court erred in giving plaintiff's instruction No. 15. Instruction No. 15 reads as follows:

You are instructed that the land now known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, is and was the property of the United

States during the periods of time charged in the indictment.

Objection was made and exception taken by appellant on the grounds that it was a question of fact to be determined by the jury.

Extracts from Reporter's Transcript 133-140.

I. THE VERDICT OF GUILTY AS TO THE APPELLANT CORPORATION IS INCONSISTENT, IRRATIONAL, AND CANNOT BE RECONCILED WITH THE VERDICT OF ACQUITTAL OF THE DEFENDANT R. DREW LAMB, THE SOLE ACTING OFFICER OF THE CORPORATION DEFENDANT MAGNOLIA MOTOR AND LOGGING COMPANY.

On February 8, 1957, there was commenced in the District Court of the United States for the Northern District of California, Northern Division, an action entitled "United States of America, plaintiff, vs. R. Drew Lamb and Magnolia Motor and Logging Co., a Corporation, defendants". Each of the defendants was charged with the violation of two counts, namely:

Count I.

I. That the defendant, Magnolia Motor and Logging Co., is a corporation organized and existing under the laws of the State of Mississippi; that the defendant, R. Drew Lamb, is the president of said corporation and at all times herein mentioned was acting within the course and scope of his employment as such president.

II. That between the 1st day of June, 1953, and the 30th day of December, 1954, in the County of

Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this court, the defendants hereto did knowingly, wilfully and unlawfully steal and convert to their own use personal property of the United States, said personal property being more particularly described as follows: Approximately 10,300 fir, cedar and hemlock logs of a value of more than $100.

Count II.

I. That the defendant, Magnolia Motor and Logging Co., is a corporation organized and existing under the laws of the State of Mississippi; that the defendant, R. Drew Lamb, is the president of said corporation and at all times herein mentioned was acting within the course and scope of his employment as such president.

II. That between the 1st day of June, 1953, and the 30th day of September, 1954, the defendants hereto did knowingly, wilfully and unlawfully depredate certain property of the United States to wit: Real property in the County of Humboldt, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court, described as follows: Portions of Sections 33 and 34, Township 11½ North, Range 3 East, Humboldt Meridian; that said depredation exceeded the sum of $100. (TR 3-4.)

On June 20, 1957, the jury returned two verdicts. The defendant R. Drew Lamb was found not guilty as to both Counts 1 and 2, and thereafter a judgment

of acquittal was entered as to said defendant Lamb. The defendant, Magnolia Motor and Logging Co., appellant herein, was found guilty as to both Counts 1 and 2, (TR 18) and on September 30, 1957, Judgment of Conviction was entered and appellant ordered to pay a fine of $10,000.00 on each count. (TR 24-25.)

Throughout the entire trial it was uncontradicted that R. Drew Lamb was the sole acting officer and alter ego of the corporation Magnolia Motor and Logging Company. It is manifest from the entire record that it was the intention and purpose of the prosecution to prove that the sole actor and wrongdoer was R. Drew Lamb.

From the government witnesses C. J. Hopkins, W. R. Ritchie and Ray Leonard Wallace, and by cross-examination of defendant Lamb, it was established without contradiction that Lamb was the managing partner of Magnolia Lumber Sales Company, the purchaser of the land in question (Tr. 1322, 1334); he was the president of appellant, Magnolia Motor and Logging Co. (Ptf. Exh. 1; Tr. 1322-1323, 1334); Lamb personally conducted the negotiations on behalf of Magnolia Lumber Sales Company at the time it purchased the land in question from Arrow Mills Co., (plaintiff's exhibit 33, Tr. 1114) and at the time it entered into an option to sell the land to Paragon Plywood Corp. (plaintiff's exh. 25(b) Tr. 629, 543-546, 555) and he returned a $100,000 deposit to Paragon Plywood Corp. and renegotiated a contract for the sale of the logs (plaintiff's exh. 25, Tr. 548, 601, 607); he controlled the area to be cut (Tr. 697-698,

1369, 879); he hired Ritchie and Wallace to cut and remove the timber (Tr. 587, 863, 1369); Lamb visited the premises at least every two weeks and kept in constant touch with his personnel by radio (Tr. 588, 675, 863, 1274, 1294, 1311, 1331); he travelled over the area and directed that "no trespassing" signs be put up (Tr. 770-771, 1277-1278); both Ritchie and Wallace testified that Lamb personally instructed them to log throughout the unsurveyed area (Tr. 672, 870); and Wallace testified that Lamb instructed him to run off the government surveyors as trespassers. (Tr. 680, 874-875.)

At one time in his testimony plaintiff's star witness, Ritchie testified and very aptly put it: "in my opinion, R. Drew Lamb and any one of the Magnolia Companies are one and the same. He does not identify which company he speaks for." (Tr. 713, 745-746.)

Appellant contends that the findings of the jury cannot be reconciled. If one is accepted, the other must be rejected.

The verdict of guilty as to the corporation is stripped of all semblance of logic or reason and does away with the presumption of correctness usually attributed to the verdict of a jury. (*Peveley Dairy Co. v. United States,* 178 Fed. 2d 363, 370-371.)

As is stated in the *Peveley Dairy Co.* case:

> "The appellants here are corporations. They could act only through officers and agents, yet the only officers and agents who could possibly have committed the violations charged were acquitted. It is true the question on review is not

> whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty as against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal. However, the verdict of not guilty as to the individual defendants in this case certainly stripped the verdict of guilty as to the corporation defendants of all semblance of logic or reason, and to our minds weakened the presumption of correctness usually attributable to the verdict of a jury."

The reviewing court must be extraordinarily careful to scrutinize the record to ascertain any prejudicial error. (*Manley v. United States,* 238 Fed. 2d 221.)

Appellant respectfully contends that the record herein contains such other prejudicial errors, as will hereinafter be set forth, as to compel this court, under the language of the *Peveley Dairy Company* and *Manley* cases, to set aside and reverse the verdict of guilty.

II. THE TRIAL COURT WAS IN ERROR IN DENYING DEFENDANTS' MOTION TO DISMISS THE INDICTMENTS CHARGING VIOLATIONS OF TITLE 18 U.S.C.A. 641 AND 18 U.S.C.A. 1361.

A. The logging and removal of standing timber on unsurveyed land is a violation of the specific provisions of either Title 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853, misdemeanor statutes, rather than a violation of the general felony and depredation provisions of Title 18 U.S.C.A. 641 and 18 U.S.C.A. 1361.

The proper statutory provision under which the defendants should have been charged, if any, was either Title 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853,

both of which are misdemeanor sections and deal specifically with the course of action under consideration by the trial court.

The applicable language of section 18 U.S.C.A. 1852 reads as follows:

> "Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or Whoever removes any timber from said public lands, with intent to export or to dispose of the same; or . . . Shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The applicable language of section 18 U.S.C.A. 1853 reads as follows:

> "Whoever, unlawfully cuts, or wantonly injures or destroys any tree growing, standing, or being upon any land of the United States . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The applicable language of section 18 U.S.C.A. 641 reads as follows:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States. . . . Shall be fined not more than $10,000, or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The applicable language of section 18 U.S.C.A. 1361 reads as follows:

> "Whoever, willfully injures or commits any depredation against any property of the United States. . . . If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000, or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

A comparison of the above statutes, and a reading of the entire transcript, will make it readily apparent that the case presented by the government was based on alleged violations of sections 18 U.S.C.A. 1852 and 1853, namely the specific acts of cutting, removing or injuring timber or trees growing, standing or being on any public land of the United States and the government attempted to use the general felony sections under which appellant was tried to apply a harsher and more severe degree of penalty for a course of action intended by Congress to be punishable as a misdemeanor under the specific provisions of sections 18 U.S.C.A. 1852 and 1853.

Judge Halbert in his Memorandum and Order dated March 18, 1957, (TR 6-12) set forth the law accurately when he said:

> "It is a well established rule of construction that where two statutory provisions apply to the same set of facts, one applying only to a specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general (*U.S. v. Chase,* 135 U.S. 255; *Ginsbury and Sons v. Popkin,* 285 U.S. 204; *McEvoy v. U.S.,* 322 U.S. 102), and in the con-

> text of a criminal prosecution, the specific provision alone will be applicable (*Price v. U.S.,* 74 Fed 2d 120, and *Robinson v. U.S.,* supra, 142 Fed 2d 433)."

From the earliest federal cases involving the cutting of standing timber on government land, the indictments have been charged under sections similar to Title 18 U.S.C.A. 1852 and 1853. See *Bligh v. U.S.,* 3 Fed. Cases 1581; *U.S. v. Darton,* 25 Fed. Cases 14919; *Teller v. U.S.,* 113 Fed. 273; *Shiver v. U.S.,* 159 U.S. 491.

The Honorable James Alger Fee, in the case *United States v. Frank J. Simpson,* U.S. District Court, District of Oregon No. C-17903, in ruling on a motion to dismiss the indictment brought in said case, indicting the said Frank J. Simpson for violation of Title 18 U.S.C.A. Sections 641 and 1361, with "unlawfully, wilfully, feloniously, and knowingly, embezzling, stealing, purloining and converting to his own use a quantity of standing timber in excess of $100.00 located on lands owned by the United States," resubmitted the indictment to the Grand Jury on the basis that it was not brought under Title 18 U.S.C.A., Sections 1852 and 1853. At one point he stated:

> "And where there is a specific statute which talks about cutting trees, wilfully injuring trees, then I think you have to go under that statute."

B. The cutting and removal of standing timber is not a violation of 18 U.S.C.A. 641 which applies only to the stealing or conversion of personalty belonging to the United States.

It is fundamental, as stated by Judge Halbert in *United States v. Lamb,* 150 Fed. Supp. 310, that standing timber is classified as realty (*United States v. Shoshone Tribe of Indians,* 304 U.S. 111 and *Capoeman v. United States,* 110 Fed. Supp. 924) hence Sec. 641 (relating to personalty) could not be applied.

The entire record is devoid of proof that any personal property of the United States was stolen or converted.

Therefore, the government has failed in its proof and the verdict of guilty must be set aside. The proof, at most, showed acts of cutting, destroying or removing timber on public lands of the United States, misdemeanors prohibited by Sections 18 U.S.C.A. 1852 and 1853, and the court exceeded its jurisdiction in entering the judgment of conviction on Count I.

C. The conviction of appellant under an indictment charging violations of sections 18 U.S.C.A. 641 and 1361, for the specific course of action which is prohibited by sections 18 U.S.C.A. 1852 and 1853, is a violation of the Fifth Amendment to the Constitution of the United States.

It is a violation of due process as protected by the 5th amendment to the Constitution of the United States to charge and convict under a specific set of facts, the violation of which is either a misdemeanor or a felony, and the choice of the statute used to bring in an indictment is left to the whim of the prosecuting authorities. There cannot be different degrees of pen-

alty for different persons for the same criminal act —this is a violation of the equal protection clause of the Constitution. (*Green v. United States,* 236 Fed. 2d 708, 712.)

Mr. Justice Black, in his dissent (in which Mr. Justice Douglas joins) in the case of *Berra v. United States,* 351 U.S. 131, at pages 137 to 140, ably expresses the position appellant contends is applicable in this case, when he says:

> "Since I think petitioner is right in saying the offense charged was only a misdemeanor, I think we should correct the plain error of the trial judge in sentencing petitioner under the felony statute.
>
> The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under §3616(a) and a felony under §145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§145 and 3616. I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit pros-

ecution for a felony under the broad language of §145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly. . . . '. . . The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.

A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.'

Yick Wo v. Hopkins, 118 U.S. 356, 370.

Black J., dissenting.

A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. Of course it is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after

a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here. See dissenting opinion in *Rosenberg v. United States,* 346 U.S. 273, 306.

The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice."

Assuming for the sake of argument that timber belonging to the United States was logged and removed by appellant, such acts would amount to a violation of Title 18 U.S.C.A. 1852 or 18 U.S.C.A. 1853 only. Since the evidence at most shows a misdemeanor, and one for which appellant had not been charged, the District Court was without power to receive a verdict of guilty or to render a judgment of conviction of a felony.

III. THE VERDICT AND JUDGMENT OF GUILTY AS TO THE APPELLANT ARE NOT SUPPORTED BY THE EVIDENCE.

A. The acquittal of R. Drew Lamb, the sole acting agent of appellant corporation affirmatively established that no crime had been committed by appellant due to the absence of either specific intent or mens rea.

Intent is a necessary and vital element to be alleged and proved by substantial evidence. (*Morissette v. United States,* 342 U.S. 246; *United States v. Lamb,* 150 Fed. Supp. 310; *Screws v. United States,* 325 U.S. 91; *Teller v. United States,* 113 Fed. 273.)

Before a man can be punished his case must be plainly and unmistakably within the statute. (*United States v. Lacher,* 134 U.S. 624, 628.) There is a presumption that the law has been obeyed.

A corporation cannot have an independent intent. It is a mere creature of its individual officers. (*Peveley Dairy Co. v. United States,* supra.) In the present case the evidence clearly shows that R. Drew Lamb was the sole acting officer and manager of appellant Magnolia Motor and Logging Co., a corporation. The intent of the corporation would of necessity have to be that of defendant Lamb.

By the acquittal of co-defendant Lamb, the jury must have found that he had no specific criminal intent—a necessary element of the crimes charged. (*United States v. Lamb,* supra.) In the face of this finding there can be no conviction of appellant corporation. There is no proof of any independent intent on the part of the appellant and certainly no proof of a *mens rea.* Here both the defendant Lamb and appellant were tried under identical facts, identical charges and identical indictments. (TR 3-4.)

B. Under all the evidence adduced, the acts of appellant, based on the investigation made and advice of counsel, revealed conduct which was less than wilful and therefore not criminal.

Before there can be a conviction, it must be found there existed in appellant a wilful and wrongful purpose to steal and/or depredate property of the United States. There can be no crime without a *mens rea,* and no crime as charged without a specific intent. It must be proved that an officer of the appellant corporation caused the lands of the United States to be entered upon and depredated knowing the same to be a part of the public domain.

Negligence is not the same as wilful violation of the law. In fact, a defendant's ignorance of something which he might have discovered, had he exercised a certain degree of care, is less than wilful. (*Trustees, Dartmouth College v. International Paper Company,* 132 Fed. 92, 98; *United States v. McKee,* 128 Fed. 1002; *United States v. Eccles,* 111 Fed. 490.)

In an earlier case involving a violation of Title 18 U.S.C.A. 1852, the court held that a defendant may rebut a showing of wilful violation by presenting evidence of circumstances of ignorance as to the section lines. (*United States v. Darton,* 25 Fed. Cases 14919.)

In the case of *United States v. McKee,* supra, the court found that there was no wilful trespass where bark was taken from trees on public domain by reason of defendant's misapprehension of the true location of a township boundary line, where three prior surveys had erroneously located the line.

In the instant case, the record stands uncontradicted that Lamb, President of appellant and Managing Partner of Magnolia Lumber Sales Co. after the purchase of the property from Arrow Mills Co., but before any logging was done, (Tr. 952, lines 8-12) Mr. William Briggs, Attorney at Law, Ashland, Oregon, who was attorney for R. Drew Lamb, Magnolia Lumber Sales Co., and appellant Magnolia Motor and Logging Co., phoned the land office in San Francisco and discussed the alleged hiatus with Mr. Carl S. Swanholm and was advised: "Mr. Briggs, there is no gap, according to our records they do join." (Tr. 917-918.) Thereafter, Mr. Briggs phoned the Bureau of Land Management office in Sacramento and was advised ". . . that their plats showed no gap and they also confirmed the fact that the government . . . couldn't lay any claim to it because the gap doesn't exist." (Tr. 919.) Thereafter, Mr. Briggs reported this information to Mr. R. Drew Lamb. (Tr. 924-925.) In addition, Mr. Briggs contacted Belcher Abstract and Title Company of Eureka, California, which would not insure title to the "unsurveyed strip" although they didn't think there was anything to worry about. (Tr. 945, lines 21-24; 962, lines 16-25.) Mr. Briggs informed Mr. Lamb that the information he had was that the corners were together and that they (Government) said there was no gap. (Tr. 948-949.)

Arrow Mills Company, the prior owners of the real property logged in the area in question, and in fact, reserved a portion of the timber when they sold the property involved to Magnolia Lumber Sales Co. (Tr. 935-936, 949, 956, 962, 1126-1127.) At the time of the

negotiations leading to the purchase of the real property from Arrow Mills Company by Magnolia Lumber Sales Co., Mr. Harry B. Jameson, President of Arrow Mills Company informed Mr. R. Drew Lamb that Mr. Jameson and Mr. Clare Shumate on or about October 26, 1949, went to the office of the Bureau of Land Management in Glendale, California and spoke to Mr. Paul Witmer, the gentleman in charge of that office. (Tr. 1116-1121, 1126.) Mr. Witmer saw that Arrow Mills was the owner of the land on both sides of the so-called unsurveyed strip and said ". . . obviously, it either belongs to one side or the other, and if you own both sides, it is yours. . . ." (Tr. 1123.)

Sidney Ainsworth, Attorney at Law, Ashland, Oregon, as attorney for the two defendants, went to Sacramento to search the United States records, and a search revealed that according to the official records, no hiatus existed, and a map in the Bureau of Land Management office in Sacramento did not show the existence of a hiatus. (Tr. 1179, 1205, 1208-1210, 1222, 1226.) This information was reported to the defendant, R. Drew Lamb. (Tr. 1214.)

The defendant, R. Drew Lamb, discussed the purported hiatus with his attorney, Mr. William Briggs and Mr. Briggs' opinion was that the hiatus was a "myth" and there was nothing to it. (Tr. 1267-1268.) In addition thereto, Mr. Lamb discussed the hiatus with Mr. Jameson, the President of the Arrow Mills Co. discussed the matter with Sidney Ainsworth, Attorney at Law, and further discussed the matter with Mr. Hopkins of Paragon Plywood and their attor-

neys, Mr. Wilson and Mr. Chamberlain, Port Angeles, Washington. (Tr. 1269-1270, 1300.) He also was shown a letter dated October 1, 1951, addressed to Hammond, Jenson and Wallen, Mapping and Forestry Services, from Carl S. Swanholm, Regional Chief, Division of Cadastral Engineering, Bureau of Land Management, United States Department of Interior, which states in part: "The official record of survey in Townships 11 and 12 North, Range 3 East, Humboldt Meridian, California, does not reveal the existence of any hiatus, or unsurveyed land between these two townships. As this alleged hiatus is officially non-existent no sales, rights, grants or transfers can be executed therein. . . . Title to unsurveyed lands will vest in the United States." (Plaintiff's Exhibit 29; Defendant's Exhibit U; Tr. 621-622, 1270.)

As a result of the above, R. Drew Lamb formed a belief that the lands in question belonged to Magnolia Lumber Sales Co. and that there was a common line between the two townships and that no hiatus existed and so believed between the 1st day of June, 1953 and the 30th day of December, 1954. (Tr. 1301-1302.)

It is uncontradicted that R. Drew Lamb, as President of Appellant, acted upon the advice of competent counsel.

While, in itself, reliance on advice of counsel is not a defense to a criminal act, it is strong evidence to rebut specific criminal intent. *United States v. Homestake Min. Co.,* 117 Fed. 481, *United States v. Midway Northern Oil Co.,* 232 Fed. 619, 632, *United States v. St. Anthony R. R. Co.,* 192 U.S. 524, 542-543.)

In *United States v. Homestake Min. Co.,* supra, p. 486, the court states:

> "The test to determine whether one was a wilful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his *honest belief,* and his actual intention at the time he committed the trespass; and *neither a justification* of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a wilful trespasser. (cases cited.)
>
> "The fact that one acted on the advice of reputable counsel is persuasive evidence of his good faith. And one who honestly follows the erroneous advice of such counsel upon questions of legal right concerning which a layman would hardly have actual knowledge is not chargeable with bad faith, or with the wilful intent to commit a wrongful act, because his counsel was mistaken in his view of the law."

See also *United States v. St. Anthony R. R. Co.,* wherein, at pages 542-543, the court, in reversing conviction of defendant, says:

> "It was done upon the advice of counsel, and the defendant used ordinary care and prudence in first being advised as to the law and upon the facts as they had been agreed upon, and there was no intention on the part of the defendant to violate any law or to do any wrongful act."

Further, appellant contends that any logging in the disputed area was open and notorious, with no effort to conceal the activities being carried on. This

raises a strong presumption that there was no felonious intent.

This strong presumption of innocence can only be repelled by clear and convincing evidence of a specific criminal intent before a conviction is authorized. *Morissette v. United States,* 342 U.S. 246, 275, *Kemp v. State,* 146 Florida 101, 104, 200 So. 368, 369.

When this presumption of innocence is considered with the overwhelming proof of the formation of an honest belief through a thorough investigation, reliance on advice of those charged with the management and control of Federal public lands and upon the advice of competent counsel, it becomes the duty of the court to find that the plaintiff has failed to sustain its burden of proof of specific intent and *mens rea* and the judgment must be reversed. *Wesson v. United States,* 172 Florida 931, 934.

C. The Court, in instructing the jury that the land now known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, is and was the property of the United States during the periods of time charged in the indictment, committed prejudicial error because it invaded the province of the jury by giving an ex post facto application to the statutes under which appellant was charged.

The court gave the jury the following instruction:

> "You are instructed that the land now known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, is and was the property of the United States during the periods of time charged in the indictment."

Appellant contends this was prejudicial error. The court invaded the province of the jury by taking from

it a determination of a question of fact. Not only was the court in error in charging that the United States owned the land now known as Township 11½ prior to March 30, 1956, because Township 11½ North did not come into existence until that date, but, in any event, the question of ownership of the property allegedly stolen or depredated was a material issue of fact to be proved by the government.

In addition to the foregoing, the court in this charge gave an *ex post facto* or retroactive application to an administrative act which made a course of conduct which was innocent when done, criminal, and punished such action. (11 Am. Jur. #348(b), p. 1176.)

There can be no conviction of theft of government property until it is shown that the property was that of the United States. (*Coacher v. United States,* 256 Fed. 525.) The ownership of the property is an essential element to be charged and proved. (*Morissette v. United States,* 342 U.S. 246.)

A survey of public land does not ascertain the boundaries of the land. It creates them. (*Cox v. Hart,* 260 U.S. 427, 436; *United States v. Northern Pacific Railway Co.,* 311 U.S. 317, 344; *Robinson v. Forrest,* 29 Cal. 317, 325; *Sawyer v. Gray,* 205 Fed. 160, 163.)

A survey is not complete until it receives the approval of the Commissioner and is filed in the District. (*United States v. Morrison,* 240 U.S. 192, 212.)

The chronology of this case is interesting and of extreme importance in pointing up the prejudicial

effect of the retroactive application of the survey which *created* Township 11½ North, Range 3 East, Humboldt Meridian.

The indictment filed February 8, 1957, charges violations of the law between the first day of June, 1953, and the 30th day of December, 1954, in that the appellant knowingly, wilfully, and unlawfully did steal and convert and depredate certain property of the United States upon real property which is described, "portions of Sections 33 and 34, Township 11½ North, Range 3 East." (TR 4.)

There is no dispute that the Wilson survey determining the existence of Township 11½ North was not filed in the District Office, Division of Land Management, Sacramento, California, until March 30, 1956, almost one and one-half years after the last date charged in the indictment.

From 1850, when California was admitted into the Union, until March 30, 1956, the acts charged could not be the basis of a criminal action because Township 11½ was non-existent legally.

The Honorable Trial Judge emasculated appellant's defense when he reversed his position taken at the time of settlement of jury instructions not to give the government instruction No. 15, as set forth above, and took the question of ownership of the property allegedly stolen and depredated from the jury. (Extracts from Reporter's Tr. 133-140.) It is a well established rule of law that the jury alone is to determine question of fact.

D. The surveys approved and filed in 1889 and 1896 legally identified the contiguous boundary lines of Townships 11 and 12, which boundary was legally established until Township 11½ was created by the filing of the Wilson survey, March 30, 1956, so as to negative any criminal intent on the part of appellant.

Township 11½ North is a strip of land lying between Township 12 North and Township 11 North, Range 3 East, Humboldt Meridian.

In 1882, a Government surveyor named Hahn surveyed said Township 11 North. In the same year a Government surveyor named Foreman surveyed said Township 12 North, using the Hahn north boundary of Township 11 as the south boundary of Township 12. In 1883, the plat of the Foreman survey of Township 12 was approved by the United States Surveyor General. In 1884, because of fraudulent survey work, both the Hahn and Foreman surveys were suspended.

In 1886, a resurvey was made of said Township 11 North by a Government surveyor named Gilcrest. In 1889 the Gilcrest survey of Township 11 was officially approved by the Surveyor General. In 1896 the said Foreman survey of Township 12, which previously had been suspended by the Surveyor General, was reinstated. This resulted in the two townships having a common boundary line according to plat.

Between 1901 and 1908, the United States issued patents in certain sections of Townships 11 and 12 North, Range 3 East-H.M. In at least one instance a single patent was issued containing contiguous parcels of land in both townships. (Defendant's Exhibits

S 1 and A 1 (Marked L 1) Tr. p. 1044, Tr. p. 1032, line 12 to p. 1044, line 22.)

In 1926 a Government surveyor named Joy retraced portions of the Gilcrest North boundary of said Township 11.

In 1954, a Government surveyor, Roger F. Wilson, was directed to investigate the condition of the survey to see *if there was a hiatus* between the two townships, and if he found one, to survey it. (Tr. 125, 133.) On March 30, 1956, the Wilson survey plat was filed and approved by the Surveyor General; this plat created Township 11½ and for the first time effected a record hiatus between Townships 11 and 12 which, until that time, had of record enjoyed a common boundary line with no intervening area between them.

As has been stated above, there can be no conviction of larceny without proof of specific intent, nor can there be a conviction of any offense without a proof of *mens rea.* When, as in this case, the evidence shows undisputedly that the United States was forced to make new boundaries in order to assert any claim to the land in question, it necessarily followed that in relying on the boundaries as they existed in 1953 and 1954, appellant could not have entertained either a specific intent to steal property of the United States, nor a specific intent to depredate property of the United States, nor in fact an intent to commit any crime.

The appellant had only an intent to deal with property it believed it was authorized to utilize. To hold

the appellant to a standard of knowledge superior to that held by the officers and agents of the United States who are charged with the responsibility of creating and maintaining the boundaries of public lands, does not accord with the concept of ordinary justice and due process that underlies our laws. It amounts to assessing a penalty for inability to prophesy that a Government Bureau will at a later date repudiate its own official action and adopt an entirely new course of conduct. Since a survey of public land does not ascertain the boundaries of the land, but rather creates them, to convict the appellant of a violation of boundaries that did not exist at the time of the act, is to render the statutes under which the appellant was convicted *ex post facto* in their operation. Had the old boundaries not been abandoned and new boundaries created on March 30, 1956, there could be no charge that the appellant had invaded and depredated public lands of the United States.

The government is the same as any ordinary proprietor of land, (*United States v. West,* 232 Fed. 2d 694.) Rights acquired under a patent may not be affected by subsequent corrective surveys. (*Green v. United States,* 274 Fed. 145; *United States v. State Investment Company,* 264 U.S. 206.)

Land once entered ceases to be public land until there is a cancellation. It then becomes within the category of public land in reference to future acts and is to be dealt with subsequently in the same manner as any other public lands of the United States. (*Barden v. Northern Pacific Railroad,* 145 U.S. 535.)

In the instant case, during the years 1901 and 1908, a substantial portion of the area in Townships 11 North and 12 North, Range 3 East, were patented. These patents were issued following the Gilcrest and Foreman surveys, and prior to the 1926 survey of Joy, wherein the first inkling of a possible hiatus came to light.

In fact, in 1950, the defendant R. Drew Lamb acquired property in the area in question through a Deed which conveyed to him a parcel of real property lying in both Township 11 North and Township 12 North, with no indication that it was other than one contiguous parcel of land. (Def. Exh. S 1, Tr. 1032-1044.)

By the testimony of one of the primary witnesses of the prosecution, Roger F. Wilson, the surveyor who established the boundaries and created Township 11½ North, it is made abundantly clear that during the time in question even the government did not know whether or not a hiatus existed. At page 133 of the transcript he is quoted as saying: "To investigate the conditions of the survey and if a hiatus was discovered, to survey it."

We are dealing here with a paradox. The appellant has been held to have formed a specific intent to enter upon public lands of the United States and steal property of the United States when the United States government did not know whether or not there was a hiatus and the government, in fact, did not know it owned the land and timber. How can the appellant

be found to have possessed a knowledge of public lands superior to that possessed by the government?

Again, how can the appellant corporation be held to have a specific intent to enter upon public lands and steal property of the United States when the jury has acquitted the sole acting officer and agent of the corporation?

Further, the Honorable Trial Court committed prejudicial error in sustaining a government objection to the admission into evidence of a letter written by a responsible agent of the governmental body charged with administering the public lands of the United States which again admits that there was no official knowledge of the alleged hiatus. (Def. Ex. H, Tr. 1412.)

This is a criminal action designed to punish a defendant for the violation of Federal statutes wherein specific intent is a vital element. It is incumbent upon the court to admit into evidence any matter which is relevant in proving a lack of such criminal intent.

Appellant did not attempt to have this exhibit admitted for the truth of its contents, but rather to corroborate the prior testimony of defense witnesses Briggs, Jameson and Ainsworth, and the defendant R. Drew Lamb, by showing the lack of knowledge of the existence of a hiatus on the part of the government prior to and during the times charged in the indictment.

Without the court's instruction No. 15, that the property in question was that of the United States

during the periods of time charged in the indictment, the jury could well have found either that the government, in issuing the early patents based on the common line set out in the Gilcrest survey, intended to dispose of all the lands which eventually came into defendant Lamb's ownership contained in Township 11 North and 12 North, including the land which was subsequently determined to be Township 11½ North, (*Greene v. United States,* 274 Fed. 145), or that the cutting of timber by appellant was based on a good faith belief that it owned the real property and timber in question and had a right to enter upon and cut the timber. (*United States v. Van Winkle,* 113 Fed. 903.) At the very least, this determination should have been decided by the jury.

CONCLUSION.

As has been pointed out, there are errors in this record in the instructions and certain rulings on the evidence, errors that resulted in a deprivation of appellant's defense. But even without said errors, merely to consider the cumulative effect of this record: i.e., that appellant corporation acted solely through its president, R. Drew Lamb, who in turn acted on the advice of counsel, who in turn rendered opinions based upon representations of the government that no hiatus existed, which evidence resulted in an acquittal of said president in the identical case based on identical facts, and identical charges, forces one reading said record without bias or prejudice, and in the exer-

cise of a fair and impartial judgment upon it, to reach the conclusion that appellant corporation acted in every instance in the honest belief that it was lawfully exercising a right which it had lawfully acquired and was, therefore, free of any criminal intent.

We respectfully request the judgment be reversed.

Dated, August 11, 1958.

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